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In the Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS E. COFFY, PETITIONER

v.

REPUBLIC STEEL CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unofficially reported at 85 Lab. Cas. (CCH) ¶ 11,012. The court's order is noted in a table at 590 F.2d 334. The opinion of the district court following remand (Pet. App. 3a-11a) is reported at 461 F. Supp. 344. The first opinion of the court of appeals (Pet. App. 12a) is unofficially reported at 82 Lab. Cas. ¶ 10,071. The first opinion of the district court (Pet. App. 13a-30a) is unofficially reported at 77 Lab. Cas. ¶ 11,158.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1978, and a petition for rehearing was denied on February 16, 1979 (Pet. App. 31a). On May 8, 1979, Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari to and including June 15, 1979, and on June 6, 1979, Mr. Justice Stewart further extended the time to and including July 16, 1979. The petition for a writ of certiorari was filed on that date and was granted on October 29, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether supplemental unemployment benefits provided pursuant to the steel industry collective bargaining agreement are a perquisite of seniority to which a returning veteran is entitled under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.*[1]

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[1] The complaint in this case alleged a violation of Section 9 of the Military Selective Service Act of 1967, 50 U.S.C. App. 459 (see A. 4-5). The provisions of that statute relating to veterans' reemployment rights were recodified without substantive change by Title IV of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. 2021 *et seq.* See *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 582 n.2 (1977). References in this brief will be to the recodified provisions, commonly referred to as the Veterans' Reemployment Rights Act.

STATUTORY PROVISIONS INVOLVED

38 U.S.C. 2021 provides in pertinent part:

> (a) In the case of any person who is inducted into the Armed Forces of the United States under the Military Selective Service Act (or under any prior or subsequent corresponding law) for training and service and who leaves a position (other than a temporary position) in the employ of any employer in order to perform such training and service, and (1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and (2) makes application for reemployment within ninety days after such person is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—
>
> * * * * *
>
> (B) if such position was in the employ of a State, or political subdivision thereof, or a private employer, such person shall—
>
> > (i) if still qualified to perform the duties of such position, be restored by such employer or the employer's successor in interest to such position or to a position of like seniority, status, and pay * * *.
>
> * * * * *
>
> (b)(1) Any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section shall be considered as having been on furlough or leave of absence during such

person's period of training and service in the Armed Forces, shall be so restored or reemployed without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration or reemployment.

(2) It is hereby declared to be the sense of the Congress that any person who is restored to or employed in a position in accordance with the provisions of clause (A) or (B) of subsection (a) of this section should be so restored or reemployed in such manner as to give such person such status in his employment as he would have enjoyed if such person had continued in such employment continuously from the time of such person's entering the Armed Forces until the time of such person's restoration to such employment, or reemployment.

STATEMENT

1. Petitioner was employed by respondent as a crane operator from April 30, 1968, until September 17, 1968, and then again from January 24, 1969, until he left to enter military service on September 9, 1969 (A. 8; Pet. App. 19a).[2] He served in the military until August 16, 1971, when he was honorably discharged (A. 8).

[2] Although a short trial was held in this case on July 31, 1975, the basic facts are not in dispute and were the subject of a stipulation entered into by the parties (A. 8-11).

Petitioner timely applied for reinstatement to his previous position on September 14, 1971, and was reinstated. Because petitioner would have been laid off by that date had he remained continuously employed with respondent, however, he was immediately placed in layoff status. Petitioner was subsequently recalled to work on July 1, 1972. During the period of layoff, petitioner received supplemental unemployment benefits (SUB) from respondent for approximately six months (approximately 25 credits) (A. 8).[3]

The supplemental unemployment benefit plan (A. 12-33) created by the collective bargaining agreement between the major steel companies (including respondent) and the United Steelworkers of America provides weekly payments to employees laid off from work. The benefits supplement unemployment compensation to which the employee is entitled under state law. The length of time during which an employee receives SUB payments while on layoff is determined by the number of credit units he has accumulated prior to layoff. Section 2.0 of the plan provides that an employee accrues one half credit for each week in which he has any of the following hours:

a. Hours worked for the Company,

[3] Because respondent erroneously credited petitioner with SUB credits for his 1968 employment, approximately $322 of benefits (approximately 9 credits) was overpaid and was recovered by respondent through deductions from petitioner's paycheck after he returned to work (A. 8).

b. Hours not worked but for which he is paid, such as vacation hours or hours for which he received jury allowance,

c. Hours not worked and not paid for but which were lost because:

(1) He was performing his duties as [a local union officer], or

(2) He was absent because of disability for which benefits are payable under a Workmen's Compensation or Occupational Disease law or the Company Program of Insurance Benefits.

(A. 19). A maximum of 52 credit units may be accrued by an employee at any one time (A. 20). He normally uses one credit unit for each week that he is paid supplemental unemployment benefits (Section 2.3, A. 20). However, the employee does not receive any SUB payments unless he has completed two years of continuous service prior to his layoff (Section 3.0, A. 20).

The SUB plan also provides (Section 7.2, A. 29):

> If an employee enters the armed services directly from the employment of the Company, he shall, while in service, be deemed for the purposes of the Plan to be on leave of absence and shall not be entitled to any Benefit. Only the credit units credited to him at the time of his entry into such service shall be credited to him upon his reinstatement as an employee of the Company with unbroken continuous service, except as may otherwise be required by law.

Thus, under the plan, upon his reemployment after military service, petitioner was credited with the credit units he had accumulated prior to his entering military service (approximately 16), but he was not accorded any additional credit units for the period he spent in military service. The parties have agreed that if petitioner had not entered military service, he would have accumulated the maximum of 52 credit units and thus would have received SUB payments for the entire nine and a half months he was on layoff status (A. 11).

2. Petitioner filed suit in the United States District Court for the Northern District of Ohio on March 13, 1974, alleging that respondent had violated his statutory veterans' reemployment rights under the Military Selective Service Act of 1967[4] by refusing to consider his military service time in computing the amount of SUB credit units he had accumulated at the time he was reinstated after his military service (A. 4).[5] Petitioner alleged that supplemental unemployment benefits are a "perquisite of seniority" (*Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225, 230 (1966)) under the statute because they represent protection against economic loss in much the same way as seniority. Thus, he claimed that upon his return to his civilian employment, his amount of SUB credit units should have been com-

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[4] See note 1, *supra*.

[5] The Department of Justice represents petitioner pursuant to 38 U.S.C. 2022.

puted "as * * * if [he] had continued in such employment continuously from the time of [his] entering the Armed Forces until the time of [his] restoration to such employment" (38 U.S.C. 2021(b)(2)).

The district court, relying on *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975), entered judgment for respondent, holding that SUB credits are accumulated based on a " 'work requirement [that] constitutes a bona fide effort to compensate for work actually performed' " (Pet. App. 23a). While the case was pending on petitioner's appeal to the Sixth Circuit, this Court decided *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977), holding that pension benefits are a perquisite of seniority under the statute and thus that the time spent in military service must be credited toward an employee's pension benefits. The court of appeals sua sponte vacated the district court's judgment and remanded the case for reconsideration in light of *Alabama Power* (Pet. App. 12a).

On remand, the district court adhered to its original decision that SUB credits are not seniority rights entitled to statutory protection. It reiterated that "SUB benefits are 'in the nature of short term compensation for services rendered' and 'not an aspect of seniority within the coverage of' " the statute and that "entitlement to SUB benefits 'require[s] more than continued status, such as a work requirement demanding actual performance on the job' " (Pet. App. 7a-8a).

The court of appeals affirmed "for the reasons set forth in [the] second opinion for the district court" (Pet. App. 2a).

SUMMARY OF ARGUMENT

38 U.S.C. 2021 requires that a returning veteran be reinstated "without loss of seniority" to the job he held when he left for military service. The veteran must receive seniority credit for his time spent in the service so that he stands in the same place on the seniority escalator as he would if he had remained on the job. The Court has construed this statute liberally for the benefit of the returning veteran. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

In *Alabama Power Co.* v. *Davis*, 431 U.S. 589 (1977), the Court held that a benefit is considered a "perquisite of seniority," subject to statutory protection, if it is in the nature of a reward for length of service, rather than in the nature of short-term compensation for work performed. This determination can be made only by examining the "true nature" of the benefit and its "function * * * in the employment system" (*id.* at 594), not simply by considering how the benefit is calculated under the collective bargaining agreement. Applying these principles, the Court has determined that layoff protection, severance payments and pension benefits are perquisites of seniority, while vacation pay is not.

The supplemental unemployment benefits (SUB) at issue in this case are payments by the company that supplement state unemployment benefits. Their purpose is to provide employees with security that they will continue to receive income during layoff periods.

Thus, SUB operates as a second stage of the layoff protection seniority system; during layoff periods, more senior employees retain their jobs while less senior employees who have achieved a minimum level of seniority receive SUB payments. These payments are similar to pension payments in that they help the employer to preserve a stable work force, but they are most closely analogous to severance payments. Both are contingent payments that occur only when a layoff occurs, and they serve as a substitute for the income that an employee has come to rely upon during his tenure on the job. Thus, SUB payments provide security for the future based upon past service, as do most seniority benefits, rather than compensation for work already performed. Accordingly, every court that has considered the question, other than the lower courts in this case, has found SUB payments to be a perquisite of seniority.

The specifics of respondent's SUB plan demonstrate that SUB payments are not compensation for work performed. Employees who have not completed two years of continuous service do not receive any SUB payments. This two-year eligibility threshold is a common feature of other provisions of the "Seniority" Article of the collective bargaining agreement. SUB credits that have been accumulated are subject to forfeiture if the employee quits or incurs a break in service. Moreover, the amount of the weekly payment is not correlated with the work performed by an employee in earning the credits; it is based upon his salary level at time of layoff, the number

of his dependents and the financial status of the SUB fund. Unlike the vacation pay considered by the Court in *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975), SUB payments are not made on a pro rata basis to employees who do not meet the two-year vesting requirement, and no additional SUB credits are provided for overtime work.

These aspects of the plan demonstrate that SUB payments are not a form of short-term compensation for work performed, but are a form of security granted in reward for length of service. Accordingly, Congress has provided that the time petitioner spent in military service must be counted toward his total of SUB credits.

ARGUMENT

SUPPLEMENTAL UNEMPLOYMENT BENEFITS ARE A PERQUISITE OF SENIORITY UNDER 38 U.S.C. 2021

A. An Employee Benefit Is A Perquisite Of Seniority If By Its "Real Nature" It Is A Reward For Length Of Service Rather Than Short-Term Compensation For Work Performed

In passing the nation's first peacetime draft law in 1940 (54 Stat. 885), Congress provided that veterans would not be prejudiced upon their return to civilian employment because of their military service. The protections enacted at that time have continued in effect until the present day. Specifically, Congress provided, in what is now codified as 38 U.S.C. 2021, that a veteran who left a position of employment as a civilian must, upon his return, "be restored [by his employer] * * * to such position or to a position

of like seniority, status, and pay." 38 U.S.C. 2021(a)(2)(B)(i). This reemployment must be "without loss of seniority." 38 U.S.C. 2021(b)(1). The statute, however, contained no definition of "seniority," and the legislative history offered no guidance as to the scope of that term. See *Alabama Power Co.* v. *Davis*, 431 U.S. 581, 585 (1977).[6]

These reemployment provisions were first construed by this Court in *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946), where the Court held that the statute did not grant a returning veteran an increase in seniority above what he would have accumulated if he had never entered the service. In analyzing the statute, the Court announced "two principles that have governed all subsequent interpretations of the reemployment rights of veterans" (*Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 584). First, the Court established the "escalator principle," stating (328 U.S. at 284-285):

> [The returning veteran] does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. * * *
>
> * * * * *
>
> He acquires not only the same seniority he had; his service in the armed services is counted as

[6] Congress' primary purpose in passing the statute was to draft men for military service. Possible problems under the reemployment provisions received little consideration. See Note, *The Supreme Court, 1965 Term*, 80 Harv. L. Rev. 123, 148 (1966).

> service in the plant so that he does not lose ground by reason of his absence.

The second principle was that "[t]his legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. * * * And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." 328 U.S. at 285.

In its reenactment of the statute in 1948 (62 Stat. 614), Congress explicitly incorporated the "escalator principle" into what is now 38 U.S.C. 2021(b)(2). That section provides that a returning veteran should be restored to his employment:

> in such manner as to give [him] such status in [his] employment as [he] would have enjoyed if [he] had continued in such employment continuously from the time of [his] entering the Armed Forces until the time of [his] restoration to such employment.

See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 584.

Protection against layoff, with respect to which the Court first announced the "escalator principle" in *Fishgold*, is a right or benefit that has traditionally been regarded as an attribute of seniority. In the years following the *Fishgold* decision, the Court continued to deal with the application of the "escalator principle" to traditional perquisites of seniority, such as order of promotion and priority with respect to job assignments. See, *e.g.*, *Tilton* v. *Missouri Pacific*

R.R., 376 U.S. 169 (1964); *Oakley* v. *Louisville & Nashville R.R.*, 338 U.S. 278 (1949).

The question of whether a particular benefit should be considered a "seniority" benefit for the purposes of the statute first arose in *Accardi* v. *Pennsylvania R.R.*, 383 U.S. 225 (1966). There, the Court applied the "escalator principle" to severance pay, a benefit that is "not traditionally considered a seniority right." *Foster* v. *Dravo Corp.*, 420 U.S. 92, 97 (1975). Under the collective bargaining agreement involved in *Accardi*, each discharged employee was paid a separation allowance according to a formula based upon the length of his "compensated service" with the railroad. The railroad argued that time spent in military service need not be included as "compensated service" because severance pay was not based on seniority—as indeed under the terms of the agreement it was not. But the Court concluded that the "real nature" (383 U.S. at 230) of severance payments was as compensation for the loss of rights and expectations that accrued during an employee's length of service with the company. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 588. The statute thus required that time spent in military service be included in calculating the severance pay allowances, because the amount of those allowances was "just as much a perquisite of seniority as the more traditional benefits such as work preference and order of lay-off and recall." 383 U.S. at 230.[7]

[7] The Court also drew support for its conclusion that the severance pay was primarily based on length of service from the "bizarre results" that the formula in the agreement could produce—theoretically, an employee could earn a year of "compensated service" by working only one day per month for seven months. *Accardi* v. *Pennsylvania R.R.*, *supra*, 383 U.S. at 230. The Court did not suggest, however, that the applicability of the statute to a particular benefit would depend upon whether such a bizarre result could be demonstrated. See *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 588 & n.9.

The Court in *Accardi* also explained the relationship between the statutory guarantee against loss of seniority and the provision granting "insurance or other benefits" to returning veterans as if they had taken a leave of absence under the employer's rules. See 38 U.S.C. 2021(b)(1). The Court found that the latter provision "was intended to add certain protections to the veteran and not to take away those which are granted him by [the seniority protection provision]." 383 U.S. at 232. Accordingly, whether a benefit can be categorized as "insurance or other benefits" is irrelevant to determining the scope of the seniority protection; the inquiry must focus on whether the benefit in question is a perquisite of seniority. See *Alabama Power Co. v. Davis*, *supra*, 431 U.S. at 588 n.10.

The Court considered a very different type of benefit in *Foster* v. *Dravo Corp.*, 420 U.S. 92 (1975), rejecting the claim that a returning veteran was entitled to vacation pay for the time spent in military service. The Court found that vacation benefits, which are commonly conceived of "as a reward for and respite from a lengthy period of labor" (420

U.S. at 101), are "intended as a form of deferred compensation" or "short-term compensation for work performed" and should not be treated as a perquisite of seniority under the statute. 420 U.S. at 100.

Most recently, in *Alabama Power* v. *Davis, supra*, the Court held that pension benefits are a perquisite of seniority with respect to which veterans are entitled to credit for time spent in the service. The Court summarized the principles that had been announced in the cases from *Fishgold* through *Foster* as establishing a two-pronged test for determining whether a benefit is a right of seniority protected by the statute (431 U.S. at 589):

> If the benefit would have accrued, with reasonable certainty, had the veteran been continuously employed by the private employer, and if it is in the nature of a reward for length of service, it is a "perquisite of seniority." If, on the other hand, the veteran's right to the benefit at the time he entered the military was subject to a significant contingency, or if the benefit is in the nature of short-term compensation for services rendered, it is not an aspect of seniority within the coverage of [the statute].

Applying these principles, the Court held that, even though "pension payments have some resemblance to compensation for work performed" (431 U.S. at 592), they "are predominantly rewards for continuous employment with the same employer." 431 U.S. at 594.

The Court in *Alabama Power* also specifically addressed the misconception that had arisen after *Accardi* that a benefit could not be a perquisite of seniority under the statute if eligibility for the benefit was based upon a bona fide work requirement.[8] This misconception had been reinforced to some extent by the Court's statement in *Foster* that "the presence of a work requirement is strong evidence that the benefit in question was intended as a form of compensation." 420 U.S. at 99. The Court had found support for the existence of a bona fide work requirement in *Foster* in the provisions of the contract that provided (1) additional vacation benefits for overtime work and (2) pro rata vacation benefits for employees who, because of layoffs, were unable to work the 25 weeks in a year ordinarily required. 420 U.S. at 100. First, the Court in *Alabama Power* explained that the work requirement in *Foster* was simply one fact that lent support to the argument that the vacation benefits were a form of compensation, but it was the nature of those benefits as "'a reward for and respite from a lengthy period of labor'" that was "decisive." 431 U.S. at 589. The Court went on to state that the particular formula by which a benefit is calculated cannot determine whether it is a perquisite of seniority because "[e]ven

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[8] See, *e.g.*, Comment, *Veterans' Reemployment Rights: Severance Pay*, 1974 Wash. U.L.Q. 296, 303; *Adams* v. *General Motors Corp.*, 525 F.2d 161, 165-166 (6th Cir. 1975). The district court relied almost exclusively on this theory in its first decision in this case (Pet. App. 23a-25a).

the most traditional kinds of seniority privileges could be as easily tied to a work requirement as to the more usual criterion of time as an employee." *Id.* at 592. See also *Palmarozzo* v. *Coca-Cola Bottling Co.*, 490 F.2d 586, 592 (2d Cir. 1973). The Court emphasized, as it had in *Accardi* (383 U.S. at 230), that the inquiry must focus on the "true nature" of the benefit. 431 U.S. at 592-593.

B. The "Real Nature" Of Supplemental Unemployment Benefits Is As Income Security Based On Length Of Service Rather Than As Short-Term Compensation

It is undisputed that the SUB payments at issue in this case satisfy the first prong of the *Alabama Power* inquiry—the reasonable certainty that the benefits would have accrued if petitioner had not gone into military service.[9] The parties have stipulated that petitioner would have been entitled to 52 credit units at the time of his layoff except for his military service (A. 8). The question presented here thus concerns the second prong of the analysis—whether the "real nature" of SUB is as a reward for length of service or, rather, as short-term compensation for work performed.

1. *The Nature and Purpose of SUB is as Income Security for Established Employees in Times of Unemployment*

The concept of supplemental unemployment benefits was first introduced in American industry in

[9] For an example of a benefit that did not meet the "reasonable certainty" standard, see, *e.g.*, *McKinney* v. *Missouri-K.-T. R.R.*, 357 U.S. 265 (1958).

1955 in the collective bargaining agreement negotiated between the United Auto Workers and the Ford Motor Company. SUB payments were incorporated shortly thereafter into labor agreements in the steel and can industries. See S. Slichter, J. Healy and E. Livernash, *The Impact of Collective Bargaining on Management* 453 (1960) [hereinafter cited as Slichter]. The introduction of SUB was the result of a vigorous drive by organized labor in the 1950's for a guaranteed annual wage. Where employment security could not be guaranteed, labor unions sought income security.[10]

The SUB plan negotiated with Ford did not completely meet labor's goal of a guaranteed annual wage because SUB payments did not amount to 100% of take-home pay, but it did serve as a method of guar-

[10] In April 1954, the UAW announced six basic principles to govern its proposal to the auto companies. The substance of the income guarantee was included in the second and third principles:

> 2. Guaranteed Annual Wage payments should be made to workers for whom management fails to provide work, in amounts sufficient to insure take-home pay adequate to maintain the living standards which the worker and his family enjoyed while fully employed.
>
> 3. All workers should be guaranteed employment or guarantee payments from the time they acquire seniority. The guarantee should assure protection against a full year of layoff for all workers and for shorter periods on a graduated basis for those who have not worked the minimum qualifying period.

See J. Becker, *Guaranteed Income for the Unemployed—The Story of SUB* 14-15 (1968).

anteeing significant income for eligible employees during layoff periods. See generally J. Becker, *Guaranteed Income for the Unemployed—The Story of SUB* 9-20 (1968). Thus, SUB has never been intended as compensation for work performed, but rather was viewed from the outset as a form of security for regular employees in times of unemployment. In addition, from its inception,[11] SUB has not been intended to be available to all employees, but only to those who have achieved a certain level of seniority. The original Ford plan was restricted to employees with one year of seniority.

The SUB provisions of the collective bargaining agreement that provide income security complement the more traditional seniority benefit of employment security. Prior to the introduction of SUB, when an employer faced a layoff situation, employees were laid off in order according to their seniority, with the more senior employees retaining their jobs while the less senior employees were left with nothing, other than the unemployment compensation provided by the state. With the advent of SUB, this situation is altered. The seniority accrued by employees with insufficient seniority to avoid being laid off no longer goes to waste; it is credited towards SUB payments. SUB thus establishes a two-tier system of layoff pro-

[11] In 1952, a union staff committee concluded that a new plan was needed to present to the industry concerning guaranteed income. That plan would have to "(a) provide employers with a strong incentive to stabilize employment; and (b) provide all seniority employees with guaranteed income." J. Becker, *supra*, at 13-14.

tection that permits the benefits of seniority to filter down to lower levels of the seniority ladder than in the past; when a layoff period ensues, the most senior employees retain their jobs, less senior employees receive SUB payments while they are laid off, and employees who have not achieved a level of seniority that makes them eligible for SUB payments receive no layoff protection.[12]

The Third Circuit focused on this relationship between SUB and traditional seniority layoff protection in contrasting vacation benefits with SUB payments for the purposes of returning veterans' seniority rights. In *Foster* v. *Dravo Corp.*, 490 F.2d 55, 59 (3d Cir. 1973), aff'd, 420 U.S. 92 (1975), the court, distinguishing the SUB payments that it had held

[12] The collective bargaining agreement at issue in this case does not provide any greater SUB rights to employees near the top of the seniority ladder than to those near the bottom. The maximum of 52 credits can be earned in two years of service. This facet of the plan was reasonable because employees near the top of the seniority ladder could be expected to retain their jobs during layoffs; thus, when the agreement was negotiated, the extent of their SUB payments was not an important concern of senior employees. This situation has changed somewhat in recent years because of the increased incidence of plant closings, which put even the most senior employees out of work. Accordingly, the SUB plan in the steel industry was amended in 1977 to provide an additional 52 weeks of SUB payments to employees with 20 or more years of seniority if they are not offered appropriate work at their home plant or suitable long term employment at another location in case of plant shutdown. See A. Freedman, "Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work," *The Conference Board* 33 (1978).

to be perquisites of seniority in *Hoffman* v. *Bethlehem Steel Corp.*, 477 F.2d 860 (3d Cir. 1973), stated:

> Unlike vacation benefits, the protection which the SUB plan furnishes is part of an employee's job security interest. The SUB plan is designed to and in fact does give the employee assurance that throughout his employment he not only earns his take home pay, but also accumulates assurance that, if exigencies of business require that he be laid off, he will have income for some period of time. The plan is a way of conferring, in diminished stature, one of the chief advantages of seniority, protection against economic loss in a period of diminishing employment. The SUB plan thus has as its purpose and effect the extension of a seniority-type protection to employees who, due to their relatively short length of service with the company, would formerly have been unprotected. Therefore, [38 U.S.C. 2021], interpreted in the light of its overall purpose and applied to give effect to evolving practice in labor relations, can fairly be said to require that the returning veteran be accorded this seniority-type advantage.

See also *Akers* v. *General Motors Corp.*, 501 F.2d 1042, 1045 n.11 (7th Cir. 1974).

Although SUB payments differ somewhat from the employment benefits this Court has previously analyzed, a number of significant similarities do exist. SUB payments play a role much like pension benefits in maintaining a stable work force for the employer during layoff periods. As the Court noted in *Alabama*

Power, "a [pension] plan may reduce employee turnover and training costs and help an employer secure the benefits of a stable work force." 431 U.S. at 594. Employees who might otherwise take other jobs remain because of their vested interest in the pension plan. Similarly, "[t]he SUB payment itself is an inducement for the employee to weather the layoff period and return to work when [the company] needs the employee's services." *Thornhill* v. *Ormet Corp.*, 84 Lab. Cas. (CCH) ¶ 10,786 at 19,020 (S.D. Ohio 1978).[13]

SUB payments are most closely analogous, however, to severance payments, which are also fundamentally "income security" benefits. See generally Slichter, *supra*, at 447-489. As one commentator has noted, "[b]oth severance pay and supplemental unemployment benefits (SUB) are designed to provide some income during unemployment, and to mitigate the income loss. Usually, such income security plans are found together with unemployment-allocating measures such as seniority provisions." A. Freedman, "Security Bargains Reconsidered: SUB, Severance Pay, Guaranteed Work," *The Conference Board* 2 (1978).

In addition to mitigating income loss, both SUB payments and severance payments are contingent

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[13] See also J. Becker, *supra*, at 248: "In short-term layoffs, SUB helps to maintain the employer's labor force intact until he is ready to resume operations. The longer the training process involved, the more an employer is likely to value the help of SUB in maintaining his labor force. Thus, this effect would have somewhat greater significance in steel, for example, than in the can industry." See also *id.* at 57.

payments.[14] An employee can have no specific expectation of receiving either type of payment, because they are made only in the event of a layoff, either temporary or permanent, that may never occur. Thus, the payments are not in the nature of compensation for work performed. Rather, as the Court said in *Accardi*, they are "compensation for loss of jobs. And the cost to an employee of losing his job is not measured by how much work he did in the past —no matter how calculated—but by the rights and benefits he forfeits by giving up his job." 383 U.S. at 230.[15]

Three cases, other than the case at bar, have dealt with the proper characterization of SUB payments under 38 U.S.C. 2021. In *Hoffman* v. *Bethlehem Steel Corp.*, *supra*, the Third Circuit held that bene-

[14] See *Thornhill* v. *Ormet Corp.*, *supra*, 84 Lab. Cas. ¶ 10,786 at 19,020.

[15] Both severance pay and SUB payments also give the employer added flexibility in decision making, such as implementing technological advances, because they cushion the impact of management decisions upon employees. One commentator has noted that "[a]fter SUB plans were established in the steel industry in 1956, two companies closed some plants that had become obsolete. The union is convinced, though positive proof is lacking, that the companies acted more swiftly and more drastically than they otherwise would have because the SUB fund was available to cushion the shock of the closings." Becker, *supra*, at 56. Severance pay also eases the way for technological change. For example, the severance payments at issue in *Accardi* were the result of the conversion of tugboats from coal to diesel fuel and the elimination of the position of fireman on all diesel tugs. 383 U.S. at 227.

fits under the identical steel industry SUB plan at issue in this case are a perquisite of seniority. In *Akers* v. *General Motors Corp.*, *supra*, the Seventh Circuit held that SUB payments under the auto industry plan are a perquisite of seniority, finding that such payments are "analogous" to the severance payments in *Accardi* (501 F.2d at 1045) and that the "obvious purpose and 'real nature' of SUB is to confer one of the chief advantages of seniority—protection against economic loss in a period of diminishing employment" (*id.* at 1045 n.11). Accord, *Parrish* v. *General Motors Corp.*, 75 Lab. Cas. ¶ 10,373 (S.D. Ind. 1974). And in *Thornhill* v. *Ormet Corp.*, *supra*, involving a SUB plan in the aluminum industry "indistinguishable" from that existing in the steel industry (84 Lab. Cas. ¶ 10,786 at 19,021), the court declined to follow the decision of the district court in this case, finding that SUB payments are "essentially perquisites of seniority which accrue by virtue of the length of an employee's service and have the same purpose and effect as other seniority benefits." *Ibid.*[16] Thus, every other court that has considered the question has concluded that SUB payments are a perquisite of seniority with respect to which a returning veteran is entitled to credit for his military service.[17]

[16] The court in *Thornhill* expressly rejected the suggestion of the district court in this case (Pet. App. 23a) that the existence of a work requirement removes SUB payments from the coverage of the statute's seniority protections. 84 Lab. Cas. ¶ 10,786 at 19,021.

[17] See also *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 782 n. 1 (Powell, J., concurring in part and dissenting

2. *The Specific Provisions of the SUB Plan in This Case Demonstrate That SUB Payments are not Short-Term Compensation but Rather are a Reward for Length of Service*

The provisions of respondent's SUB plan clearly negate the suggestion that SUB payments are intended as a form of deferred compensation for work performed. Employees do not become eligible for SUB payments at all until they have completed two years of "continuous service" (Section 3.0, A. 20). Accordingly, an employee who is laid off after working for 23 months is not eligible for any SUB payments, while an employee who is laid off after working for 24 months is eligible for SUB payments and would receive those payments for 52 weeks.[18] This remarkable disparity in the SUB treatment of two employees who have performed virtually the same amount of work is completely inconsistent with the characterization of SUB payments as compensation for work performed.

The requirement of a vesting period before receiving SUB benefits is a common feature of other benefits that are covered by the statutory seniority protection. Pension plans, for example, almost invariably require a vesting period of service before an

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in part) ("benefit"-type seniority ordinarily includes unemployment insurance payments).

[18] An employee earns one-half SUB credit for each week worked (Section 2.0, A. 19), so after two years an employee will have earned 52 credits.

employee becomes eligible for benefits.[19] In fact, Article 10 of the collective bargaining agreement between respondent and the United Steelworkers, entitled "Seniority" (A. 34-55), makes clear that two years of continuous service is a critical period for the receipt of traditional seniority benefits. Section 12 of Article 10 has the purpose of increasing intraplant job security for "longer-service [e]mployees" (A. 41). Under this section, seniority pools are established for job security purposes, and employees who have two years of plant continuous service are eligible for layoff protection in those pools (A. 41-43). Section 13—Interplant Job Opportunities and Section 14—Manning of New Facilities are also keyed to employees who have two years of plant or company continuous service (A. 44, 48, 52). Thus, the district court's conclusion (Pet. App. 8a) that the two-year service requirement for SUB eligibility does not relate the benefits to length of service is mis-

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[19] To be sure, the vesting period of two years involved in this case is far shorter than the 15-year vesting requirement of the pension plan involved in *Alabama Power*. However, the Court there noted that the shorter vesting periods established under Section 202 of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1053 do not alter the nature of pension plans for the purposes of veterans' reemployment rights. 431 U.S. at 590 n.13. Moreover, the two-year vesting period here is on the same scale as the benefit payout period, which is limited to one year. Pension payments generally continue for the lifetime of an employee, often with a right of survivorship in a spouse. See D. McGill, *Fundamentals of Private Pensions* 118-119, 140 (3d ed. 1975). Thus, a longer vesting period for them is appropriate.

taken. On the contrary, the two-year requirement is the standard in the collective bargaining agreement for determining "longer-service employees" who are eligible for traditional seniority benefits.[20]

Other features of the SUB plan also are inconsistent with the characterization of SUB payments as compensation for work actually performed. SUB credits that have been accumulated are lost when an employee incurs a breach in continuous service (Section 2.5, A. 20). An employee is disqualified from receiving SUB benefits if he quits or is on layoff due to a strike (Section 3.5, A. 23).[21] Hence, an employee does not have a vested right to SUB benefits, as he would to compensation for his work; his right to the benefits is subject to conditions that relate to his continued service with the company.

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[20] Respondent recognized that petitioner's military service should be included in his "continuous service" total, which is also used as the measure of service for pension purposes (A. 15). Accordingly, it found that petitioner had satisfied the two-year vesting requirement and declared him eligible for SUB benefits, although he had worked for the company for only seven and one-half continuous months prior to his layoff in September 1971. Respondent, however, did not count the time petiitoner spent in military service in calculating his SUB credits. This anomalous treatment—crediting military service as company service for one SUB purpose but not for another—enabled petitioner to receive some SUB payments, but considerably less than he would have received had he not entered the service.

[21] An employee is also not entitled to receive SUB payments if he is entitled to receive a similar benefit under an arrangement provided by another employer with whom the employee has "more service" (Section 7.3, A. 29-30).

Moreover, the amount of the weekly SUB payment received is not correlated to the earning of the credits, as true compensation would be. The payment is based upon the employee's wage at the time of layoff, rather than when the SUB credits are earned. Compare *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 594. This base is then adjusted according to the number of an employee's dependents (Section 1.0, A. 17). Clearly, this adjustment has nothing to do with compensation. Rather, as the court stated in *Thornhill* v. *Ormet Corp.*, *supra*, "a larger benefit is paid an employee with more dependents because a greater inducement is necessary to assure his continued employment." 84 Lab. Cas. ¶ 10,786 at 19,020 n.9. Finally, an employee's SUB payments are always subject to reduction, without any action on his part, in order to safeguard against excessive depletion of the SUB fund (Section 1.5, A. 18-19).

These provisions contrast sharply with the vacation benefits in *Foster* v. *Dravo Corp.*, *supra*, which the Court found to be intended as short-term compensation for work performed. The Court stressed two features of the benefits in *Foster*, neither of which is present in the SUB plan. First, vacation benefits were awarded on a pro rata basis to employees who did not work the minimum 25-week period due to layoffs (420 U.S. at 100); here, SUB payments are not made on a pro rata basis to employees who have not satisfied the two-year vesting requirement. Second, the agreement in *Foster* provided additional vacation benefits to employees who had worked sub-

stantial overtime (*ibid.*); no additional SUB credits are provided for overtime work. Thus, while (with limited exceptions) SUB credits are granted only to employees who are working,[22] there is no correlation between the amount of work performed and the amount of benefits credited.

In sum, the district court erred in finding that "SUB benefits are 'in the nature of short term compensation for services rendered'" (Pet. App. 7a-8a). The court incorrectly focused its attention on whether the SUB plan "constitutes a bona fide effort to relate qualification for weekly benefits under the SUB plan to work actually performed" (Pet. App. 24a; see also *id.* at 7a). In *Alabama Power*, this Court explained that there is no such "*Foster* test of a 'work requirement'" (Pet. App. 7a); *Foster* turned on the "real nature" of vacation benefits. 431 U.S. at 589, 592. The Court noted that any seniority benefit could easily be tied to a work requirement. *Id.* at 592. Thus, conditioning the treatment of a benefit upon the existence of a work requirement would leave the

[22] SUB credits are accumulated by employees while they are on paid vacation or jury duty, while serving as a local union officer, or while absent because of disability (Section 2.0, A. 19).

Moreover, the SUB plan does not contain a minimum hours requirement for those employees who earn credits while working. The district court found that it is "very unusual" for an employee in the steel industry to work less than 32 hours in any week (Pet. App. 24a). In those unusual cases, however, an employee working less than 32 hours would receive the same amount of SUB credits, under the terms of the plan, as an employee working 32 or more hours.

characterization of a benefit up to the employer. However, "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285. See also *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 592.[23] The test is the "real nature" of the benefit and its "function * * * in the employment system" (*id.* at 594). The true nature and function of SUB payments is as a reward for length of service, not as compensation for work performed.

The effect of respondent's SUB policy is simple; a fellow employee who both began work and was laid off on the same date as petitioner would have continued to receive SUB payments for several months after SUB payments to petitioner were discontinued. This disparity in treatment results solely from the fact that petitioner took time off from his job to serve his country. It was precisely to prevent this type of disadvantage to returning veterans that Congress enacted the veterans' reemployment rights provisions. See 38 U.S.C. 2021(b)(2).

[23] Respondent's intention that SUB credits not accrue to employees in military service, which is clearly expressed in Section 7.2 of the SUB plan (A. 29), thus has no effect on the veterans' rights that are guaranteed by Congress. Section 7.2 explicitly recognizes this fact in providing that returning veterans do not receive SUB credits for their time in military service "except as otherwise provided by law" (*ibid.*).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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